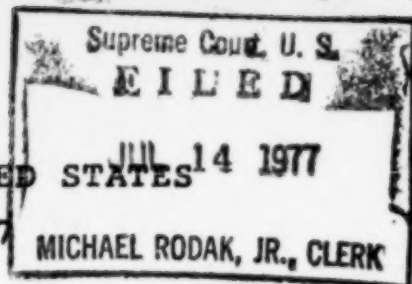


IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977



No.

76-1854

EDWARD J. LARKIN and JULIA LARKIN,
Petitioners,

v.

DAVID A. FARRELL, Cayuga County
Treasurer, et al.,

and

TOWN BOARD OF THE TOWN OF FLEMING,
Cayuga County, et al.,

New Party Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI FROM DECISIONS OF SUPREME
COURT OF THE STATE OF NEW YORK, APPELLATE
DIVISION, FOURTH JUDICIAL DEPARTMENT, and
the COURT OF APPEALS OF THE STATE OF NEW
YORK

JAMES G. CUDDY, of Counsel
CUDDY AND DURGALA
188 Genesee Street
Auburn, New York 13021
Telephone No. (315) 253-3263
Counsel for Respondents

July 6, 1977

INDEX

	<u>Page</u>
OPINION BELOW	2
RESPONSE TO QUESTIONS PRESENTED ..	2-3
CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED	3
STATEMENT OF THE CASE	3-6
ARGUMENT	6-8
REASONS FOR DENYING THE WRIT	8-9
CONCLUSION	9
APPENDIX:	
ORDER OF NEW YORK STATE COURT OF APPEALS	10-11
49A MCKINNEY'S N.Y., REAL PROPERTY TAX LAW, §702, pp. 424 and 425	12-13
49A MCKINNEY'S N.Y., REAL PROPERTY TAX LAW, §936(1), p. 31	13-14
49A MCKINNEY'S N.Y., REAL PROPERTY TAX LAW, §1000(1), p. 64	14-15
61 MCKINNEY'S N.Y., TOWN LAW, §202(3), Pocket Part p. 26	15-16

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

EDWARD J. LARKIN and JULIA LARKIN,
Petitioners,

v.

DAVID A. FARRELL, Cayuga County
Treasurer, et al.,

and

TOWN BOARD OF THE TOWN OF FLEMING,
Cayuga County, et al.,

New Party Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI FROM DECISIONS OF SUPREME
COURT OF THE STATE OF NEW YORK, APPELLATE
DIVISION, FOURTH JUDICIAL DEPARTMENT, and
the COURT OF APPEALS OF THE STATE OF NEW
YORK

Respondents, David A. Farrell, Cayuga
County Treasurer, et al, and Town Board
of the Town of Fleming, respectfully pray
that this petition for a writ of certio-
rari be denied.

OPINION BELOW

In addition to the decision and order of the Court of Appeals of New York State made on February 22, 1977 and incorrectly cited in the petition as 40 NY2d 917 (the correct citation being 41 N.Y.2d 802) the Court of Appeals of New York State did make an order on October 26, 1976 (40 N.Y.2d 917) dismissing petitioners' appeal on constitutional grounds -- see Appendix, page 10 and 11.

RESPONSE TO QUESTIONS PRESENTED

The questions presented by petitioners are unclear, inaccurate, argumentative and ridiculous.

The only questions involved are:

1. Whether the petitioners have raised their objections to the taxes in a legal and timely manner?
2. Whether the county (Cayuga County,

3.

New York) has the right under the terms of the New York State Real Property Tax Law and Town Law to sell real estate for non-payment of taxes where the taxes have not been paid for five consecutive years?

CONSTITUTIONAL PROVISIONS
& STATUTES INVOLVED

49A McKinney's N.Y., Real Property Tax Law, Section 702, p. 424-425, Section 936(1) p. 31, and Section 1000(1), p. 64.

61 McKinney's N.Y., Town Law, Section 202(3), Pocket Part p. 26.

STATEMENT OF THE CASE

The petitioners are in error in the first paragraph on page 8 in alleging that there was an admission by the respondents herein to the allegations contained in paragraph 11 of petitioners' verified Complaint which is quoted in said paragraph and which is described as paragraph

number 12. The language quoted as being paragraph number 12 is actually the language of paragraph number 11 which was denied by the respondents.

The respondents admit that the petitioners have not connected their properties to the water service but the respondents also deny that this excludes said properties from being subject to the tax which has been levied for the formation of the Water District and the installation of the water storage and supply system. The water mains of the system are located immediately in front of the buildings located on both of the properties owned by the petitioners. When the water distribution system was installed, provision was made for service connections to both of these properties. Because of their disapproval of the Water District the petitioners have voluntarily elected

5.

not to use that water.

If the property of the petitioners was not located within the Water District, or if their properties were so located that the service could not be provided to their properties, their argument might have some merit.

It is basic municipal and tax law that taxpayers do not have individual options to participate in or avoid particular taxes for such special purposes as schools, water, sewers and fire protection.

Petitioners are not subject to quarterly charges for water consumed (as are those properties which are connected to the water supply system). They are billed on the annual tax bill based on the number of properties owned and at a per unit (property) rate of approximately \$160.00 per year.

They have never been billed for any

6.

other charges or expenses.

ARGUMENT

It is herein agreed that much of the companion case (Larkin vs. Town Board of Town of Fleming regarding \$36,000.00 bond resolution) is relevant.

Petitioners admit that the Town Board has full authority to assess Water District real property to pay for the construction costs of a water system (Larkin petition, p. 10). These are the only types of charges which have ever been made against the petitioners.

The New York Real Property Tax Law provides for the manner in which assessments are to be challenged and in which taxes are to be collected. The basic laws involved are Real Property Tax Law, Section 702, 936(1) and 1000(1) -- Appendix, page 12, 13, 14 and 15.

There is no question that the petitioners did not commence any proceeding under Real Property Tax Law, Section 702, for the years 1969, 1970, 1971, 1972 and 1973 (or any subsequent years).

The first action they took was on or about August 29, 1974 when they sought an injunction to prevent the tax sale of their property by the Cayuga County Treasurer. This action occurred when they became aware that their property would be sold.

They lost their remedy to challenge the assessment by failure to commence a proceeding within 30 days after the final completion and filing of the assessment roll.

The taxes which the petitioners herein dispute are levied under Town Law, Section 202(3) -- see Appendix, page 15 and 16,

pursuant to the provisions of Town Law, Section 198(3).

The taxes are levied solely because the real estate owned by the petitioners is located within the Water District and the water supply service is available (even though they have not elected to use it).

The allegations made by petitioners at pages 18 and 19 of their brief regarding payment of illegal attorneys fees and overspending of the amount authorized for the District and construction of the water supply and distribution system are false and ridiculous.

REASONS FOR DENYING THE WRIT

There is no constitutional question involved.

There is no question involved as described in Federal Rules of Appellate Procedure, Rule 19, 1.(a) and (b).

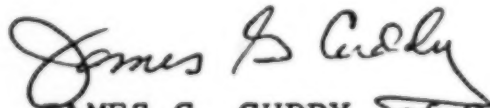
9.

The petitioners did not pursue their statutory remedy by commencing a proceeding to review the assessment of their real property in any year involved. Accordingly, they have lost their remedy.

CONCLUSION

This litigation should be concluded by the dismissal of the petition for a writ of certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "James G. Cuddy".

JAMES G. CUDDY, of Counsel
CUDDY AND DURGALA
188 Genesee Street
Auburn, New York 13021
Tel. No. (315) 253-3263
Attorney for Respondents

APPENDIX

Order of the New York State Court of
Appeals made on October 26, 1976.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court
of Appeals Hall in the City of Albany on
the twenty-sixth day of October, A. D.
1976

PRESENT, HON. CHARLES D. BREITEL, Chief
Judge, presiding.

4 Mo. No. 1022 SSD 89

In the Matter of the Application of
Edward J. Larkin and Julia Larkin,

Appellants,

vs.

Town Board of the Town of Fleming,
et al.,

Respondents.

11.

Edward J. Larkin and Julia Larkin,
Appellants,

vs.

David A. Farrell, Cayuga County Treasurer,
et al., and Town Board of the Town of
Fleming, et al.,

Respondents.

The appellants having filed notices of
appeal in the above titles and due consid-
eration having been thereupon had, it is

ORDERED, that the appeals be and the
same hereby are dismissed without costs,
by the Court sua sponte, upon the ground
that no substantial constitutional ques-
tion is directly involved.

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

49A McKinney's N.Y., Real Property Tax Law, Section 702, pp. 424 and 425. Place where and time within which proceeding to be brought.

1. A proceeding to review an assessment of real property under this article shall be brought at a special term of the supreme court in the judicial district in which the assessment to be reviewed was made.

2. Such a proceeding shall be commenced within thirty days after the final completion and filing of the assessment roll containing such assessment. For the purposes of this section an assessment roll shall not be considered finally completed and filed until notice thereof has been given as required by law.

3. If it appears upon the answer that the petition or petition and notice,

when such notice is required by section seven hundred four of this chapter, were not served or served and filed where required pursuant to section seven hundred forty of this chapter, within the time limited therefor, the failure to serve or file the petition or petition and notice within such time shall constitute a complete defense to the petition and the petition must be dismissed.

49A McKinney's N.Y., Real Property Tax Law, Section 936(1), p. 31. Return of unpaid delinquent taxes.

1. Upon the expiration of his warrant, each collecting officer shall make and deliver to the county treasurer an account, subscribed and affirmed by him as true under the penalties of perjury, of all taxes listed on the tax roll which remain unpaid, except that such collecting

officer shall not include in such account the amount of the installments of taxes returned unpaid pursuant to subdivision one of section nine hundred seventy-six of this chapter. The county treasurer shall, if satisfied that such account is correct, credit him with the amount of such unpaid delinquent taxes. Such return shall be in the form prescribed by the state board and shall be endorsed upon or attached to the tax roll.

49A McKinney's N.Y., Real Property Tax Law, Section 1000(1), p. 64. Time for commencement of tax sale proceedings.

1. Whenever a tax on a parcel of real property returned to the county treasurer in any county remains unpaid on the first day of August, except as hereinafter provided in this section, tax sale proceedings shall be commenced as provided

in this title for the payment of the tax, the interest thereon and the share of expense of advertising and conducting the sale attributable to such parcel as determined by the county treasurer.

61 McKinney's N.Y., Town Law, Section 202(3), Pocket Part p. 26. Expenses of improvement; how raised.

3. The expense of the establishment of a park, public parking, water, lighting, snow removal, water supply, water, water storage and distribution, sidewalk, refuse and garbage, aquatic plant growth control district, harbor improvement district, public dock district, fallout shelter district, or beach erosion control district, and providing improvements or services, or both, therefor, and of constructing lateral water mains pursuant to paragraph (b) of subdivision one of section one hun-

16.

dred ninety-nine, shall be assessed, levied and collected from the several lots and parcels of land within the district for each purpose in the same manner and at the same time as other town charges, except as otherwise provided by law. . . .